

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Comment Sought on Streamlining Deployment	)	WT Docket No. 16-421
of Small Cell Infrastructure by Improving	)	
Wireless Facilities Siting Policies	)	
	)	
Mobilitie, LLC Petition for Declaratory Ruling	)	
	)	

**REPLY COMMENTS OF CROWN CASTLE INTERNATIONAL CORP.**

Crown Castle International Corp. and its subsidiaries (“Crown Castle”) submit these reply comments in response to the Wireless Telecommunications Bureau’s Public Notice requesting comments on streamlining deployment of small cell infrastructure.

**I. Introduction and Summary**

While the initial comments submitted in this proceeding reflect many disagreements between industry and municipal commenters, they nevertheless demonstrate a common recognition of the potential for small cell networks to deliver the potential of next generation wireless broadband. They also clearly demonstrate that 5G networks pose new challenges for deployment, requiring further action by the Commission. To realize the technological and economic benefits of 5G networks, the agency must strike the proper balance between advancing the federal interest in telecommunications policy against the interest of state and local jurisdictions in promoting safety and reasonable management of public facilities. Although the interests may, at times, conflict, they are not mutually exclusive. Crown Castle believes the record presents the Commission with a clear understanding of issues faced by the industry in

attempting to deploy small cell networks and a clear path to streamline wireless deployment without interfering with the important work of states and cities.

It is clear from the record that an effective approach to deployment of next generation broadband networks must begin with the premise that one size does not fit all. This is true both of the jurisdictions in which these networks will be built and of the public utilities and infrastructure providers that will be deploying next generation broadband networks. The Commission's role, therefore, is not to proscribe specific processes or procedures that jurisdictions must follow in evaluating applications to access the public rights-of-way or to install small cell infrastructure, but rather to establish guidelines within which states and localities can exercise their reasonable discretion. In its opening comments, Crown Castle identified several actions the FCC can take to facilitate small cell deployment without interfering with the role of municipalities, such as clarifying the application of Section 253 to fiber-based small cell networks, clarifying that municipalities cannot unreasonably discriminate in their management of the rights-of-way, identifying practices that presumptively "prohibit or have the effect of prohibiting" telecommunications service, and establishing a shot clock with a deemed grant remedy for applications to install small cell networks. The record appears to broadly support these actions, and Crown Castle urges the Commission to take them.

At the same time, the Commission must also account for the differences in small cell providers. As notable in the record, Crown Castle differs from many other carriers that deploy small cell networks, both in its business plan and its approach to network design and deployment. First, Crown Castle does not hold any wireless licenses, but rather utilizes exclusively wireline networks to provide next generation broadband services. Crown Castle entities currently hold utility certifications in 45 states, the District of Columbia, and Puerto Rico

to provide these services. Second, Crown Castle goes to great efforts to utilize facilities that are aesthetically pleasing and consistent with their surroundings.<sup>1</sup> Crown Castle utilizes existing utility poles or high quality new poles that are typically no more than 30-40 feet in height, in contrast to other providers whose poles can be as much as three times that height. Despite these differences, all too frequently, Crown Castle's projects are stalled by municipalities applying a lowest common denominator approach that subjects Crown Castle to regulations more applicable to traditional wireless towers than to fiber optic networks with discreet nodes. The Commission must account for the many different types of facilities used and the different levels of scrutiny that are appropriate for each type of facility to promote the rapid deployment of next generation broadband networks.

## **II. The Record Reflects Broad Support for A Balanced Approach to Streamlining State and Local Review of Small Cell Installations**

The initial comments demonstrate the need for further action by the FCC to expedite deployment of advanced broadband and wireless networks by streamlining the state and local application process. It is no coincidence that every commenter involved in the development of advanced wireless networks and services identified procedural and financial barriers that impede the deployment of small cell networks and 5G services.<sup>2</sup> The universality of this experience underlines the urgency of the problem. As Chairman Pai recently recognized, “when it comes to

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<sup>1</sup> For example, in Wildwood, New Jersey, Crown Castle purchased poles for the boardwalk from the same manufacturer as the existing poles to ensure that they had a consistent appearance. See Christopher South, *Wildwood to Get Wireless Boost with New Relay Poles*, The Leader (Mar. 28, 2017), available at [http://www.shorenewstoday.com/wildwood/wildwood-to-get-wireless-boost-with-new-relay-poles/article\\_35efb2f4-cc61-5a23-a766-e44aab1a2cde.html?utm\\_medium=social&utm\\_source=email&utm\\_campaign=user-share](http://www.shorenewstoday.com/wildwood/wildwood-to-get-wireless-boost-with-new-relay-poles/article_35efb2f4-cc61-5a23-a766-e44aab1a2cde.html?utm_medium=social&utm_source=email&utm_campaign=user-share).

<sup>2</sup> See, e.g., Comments of AT&T Inc. (“AT&T Comments”) at 4, 7-9, 15-19, 23-24; Comments of Competitive Carriers Association (“CCA Comments”) at 6-8; Comments of CTIA (“CTIA Comments”) at 10-19; Comments of ExteNet Systems, Inc. (“ExteNet Comments”) at 5-17; Comments of Mobilitie, LLC at 9-16; Comments of NTCA-The Rural Broadband Association at 4-5; Comments of Sprint Corp. (“Sprint Comments”) at 13-31; Comments of T-Mobile USA, Inc. (“T-Mobile Comments”) at 4-8; Comments of Verizon, Inc. (“Verizon Comments”) at 6-11; Comments of Wireless Infrastructure Association (“WIA Comments”) at 5-22.

realizing the promise of 5G, streamlining rules to lower the cost of infrastructure deployment will be as important as allocating spectrum.”<sup>3</sup>

To address these concerns, numerous commenters agreed with Crown Castle that the FCC should clarify that Section 253 of the Communications Act applies to the deployment of network equipment and infrastructure in the rights-of-way—even if those networks ultimately support wireless services exclusively or in part.<sup>4</sup> Commenters identified several practices (also encountered by Crown Castle) that the Commission should recognize discriminate against small cell network providers, whether under Section 253 or 332. For instance, CTIA described utility undergrounding requirements that “operate as *de facto* prohibitions on wireless technologies that also discriminate against them,” given the need for over-the-air transmission.<sup>5</sup> Such requirements either entirely prohibit the installation of small cell networks or, at the very least, force network providers to use municipally-operated utility poles at monopoly rates dictated solely by the municipality.<sup>6</sup>

Other commenters described how some municipalities force applicants through an onerous local zoning review process not applied to other utilities and users of the rights-of-way.<sup>7</sup> While states and localities still have a role to play in protecting public safety, they can easily perform this role through the issuance of building permits, permits to construct in the right-of-

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<sup>3</sup> Remarks of FCC Commissioner Ajit Pai at Carnegie Mellon University's Software Engineering Institute (Mar. 15, 2017), *available at* [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-343903A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-343903A1.pdf).

<sup>4</sup> *See, e.g.*, AT&T Comments at 9-12; CCA Comments at 26; CTIA Comments at 19-22; ExteNet Comments at 30-33; T-Mobile Comments at 30-35; Verizon Comments at 11-14; WIA Comments at 22-24, 51-55.

<sup>5</sup> CTIA Comments at 12-13.

<sup>6</sup> *See* WIA Comments at 70 (noting that some municipalities “will declare an area to be ‘underground only,’ with the only above-ground poles in the rights-of-way owned by the municipality).

<sup>7</sup> *See* T-Mobile Comments at 28-29 (explaining that “a wireless ROW applicant must not be required to provide more information or go through an elongated process or technical review to obtain a permit than telecommunications providers that are not deploying wireless facilities”); WIA Comments at 10 (“It is essentially unheard of for other entities with facilities in the same rights-of-way to be subject to such zoning requirements.”).

way, and other generally applicable construction permitting requirements rather than through a discriminatory process not applied to other users.<sup>8</sup>

Other practices appear to be just as widespread, and just as damaging to wireless deployment. Many commenters described how localities' use of moratoria prevent or slow new broadband investment.<sup>9</sup> And there was widespread recognition that municipalities use excessive and discriminatory fees to deter small cell installations.<sup>10</sup>

Commenters also broadly agreed with Crown Castle that the Commission should revisit certain issues from the *2014 Infrastructure Order* to expedite deployment of small cell networks. For example, a number of commenters encouraged the FCC give effect to the shot clock by adopting a "deemed granted" remedy under Section 332.<sup>11</sup> Other commenters recognized that local jurisdictions are misinterpreting Section 6409 of the Spectrum Act, thereby limiting its usefulness in streamlining deployment of small cell networks.<sup>12</sup>

On the other side, a number of municipal commenters weighed in to argue that their practices were reasonable, or that providers shared some of the blame for delay in broadband rollout. Some of these comments are incomplete; for example, in Virginia, applications to use Department of Transportation rights-of-way have been delayed not because of carrier lassitude, but rather because the fees demanded for deployment are so high as to make construction of

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<sup>8</sup> See Comments of Crown Castle Int'l Corp. ("Crown Castle Comments") at 29.

<sup>9</sup> See, e.g., CTIA Comments at 25-26; Verizon Comments at 6-10.

<sup>10</sup> See AT&T Comments at 17-19; CCA Comments at 15-20; CTIA Comments at 28-33; ExteNet Comments at 39-41; Comments of Fiber to the Home Council Americas at 15-16; T-Mobile Comments at 8; Comments of U.S. Chamber of Commerce at 4; WIA Comments at 67-70.

<sup>11</sup> See AT&T Comments at 25-27; CCA Comments at 11; CTIA Comments at 39-43; Comments of Lighttower Fiber at 24-25; Comments of Mobile Future at 4-6; Sprint Comments at 41-42; T-Mobile Comments at 25-28; Verizon Comments at 25.

<sup>12</sup> See Comments of California Wireless Association at 1; Verizon Comments at 19.

facilities non-economic.<sup>13</sup> Similarly, San Francisco’s assertion that things are working smoothly is belied by the years-long court challenge to that city’s regulations now before the California Supreme Court.<sup>14</sup> Indeed, the courts have already trimmed back some of the more onerous requirements imposed by San Francisco.<sup>15</sup> These issues aside, a point-by-point response to the individual anecdotes raised by municipal commenters is unnecessary. The sheer volume and universality of experience shared by service providers demonstrates conclusively that more action by the Commission is required.

The Commission should act swiftly to adopt these widely-supported proposals. Doing so will expedite the deployment of small cell networks and help more Americans realize the potential of 5G.

### **III. The Commission Should Adopt an Abbreviated Shot Clock for Small Cell Applications**

Crown Castle agrees with a number of commenters that the Commission can encourage the deployment of next generation networks by adopting an abbreviated shot clock for all small cell applications. Specifically, Crown Castle supports CTIA’s proposal for “a 60-day shot clock for collocations on non-tower structures that would otherwise be covered by Section 6409(a) but for the absence of an existing approved antenna.”<sup>16</sup> CTIA’s approach would address two critical barriers to network deployment: (1) efforts by some state and local governments to avoid the application of Section 6409 through a narrow interpretation of what constitutes an “existing . . . base station”;<sup>17</sup> and

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<sup>13</sup> See Comments of Virginia Department of Transportation at 7 (describing more than 500 incomplete applications to install small cell facilities).

<sup>14</sup> See Comments of City and County of San Francisco at 5-10.

<sup>15</sup> See *T-Mobile West Corp. v. City and County of San Francisco*, 2014 WL 12631485 (Cal. Super. Nov. 26, 2014) (finding portions of the San Francisco Ordinance preempted by Section 6409).

<sup>16</sup> CTIA Comments at 34.

<sup>17</sup> See Crown Castle Comments at 38-39.

(2) otherwise unreasonably long review periods for small cell applications. As CTIA explains, “[t]hese small collocations do not require 90 days to review; indeed, states already process similar collocation requests in even less time.”<sup>18</sup> Moreover, as Verizon points out, the 60 day shot clock is consistent with recent state legislation adopted in a number of jurisdictions.<sup>19</sup> As a result, any claim that 60 days is insufficient time to review small cell applications, which are generally non-obtrusive, falls flat.

Furthermore, Crown Castle agrees that 90 days is ample time for jurisdictions to act on applications for new sites or those requiring substantial modification.<sup>20</sup> Several states have already reached the same conclusion, with Virginia and Michigan providing up to 90 days and other states, like Minnesota and Kentucky, providing even less.<sup>21</sup> A 60 day shot clock for collocation applications and a 90 day shot clock for non-collocation applications strikes the proper balance between providing municipalities with a reasonable amount of time to review applications without needlessly delaying the benefits of small cell network installations.

#### **IV. Arguments Against Clarifying the Application of Federal Law to Municipal Review of Small Cell Installations Are Misplaced**

Municipal arguments against FCC action to streamline deployment of next generation broadband networks can be grouped into three broad categories: (1) the Communications Act prohibits the extension of Section 253 to the installation of networks used to provide wireless services; (2) FCC regulation of application rates and usage fees constitutes a taking in violation of the Fifth Amendment of the Constitution; and (3) state legislations and model ordinances

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<sup>18</sup> CTIA Comments at 35.

<sup>19</sup> See Verizon Comments at 26-27.

<sup>20</sup> See CTIA Comments at 36-37.

<sup>21</sup> See *id.* at 37 (citing Mich. Comp. Laws Serv. § 125.3514(8); Va. Code Ann. § 15.2-2232(F); Minn. Stat. § 15.99, Subd. 2(A) (deeming applications granted after 60 days); Ky. Rev. Stat. § 100.987(4)(c) (same)).

preclude the need for Commission action. As explained below, however, none of these arguments can withstand proper scrutiny.

**A. Crown Castle’s Applications to Deploy Advanced Fiber Optic and Small Cell Networks Are Governed by Section 253.**

One of the key areas of dispute in the initial comments (and one that is not directly addressed in the *Public Notice*) is the interplay between Sections 253 and 332. Several municipal commenters advanced an incorrect interpretation of Section 332 that they say prohibits the application of Section 253 to small cell networks used to offer wireless services.<sup>22</sup> There are two flaws with this argument. First, the municipal commenters ignore both the plain statutory language and the established Commission precedent that call for an expansive interpretation of Section 253. Second, even if the interpretation advanced by these municipalities was correct as to networks and facilities that are only designed to provide wireless services, it is inapplicable to Crown Castle’s advanced fiber optic and small cell networks.

As an initial matter, the municipal commenters’ reliance on Section 332(c)(7)(A) as precluding the application of Section 253 to small cell networks is based on a flawed interpretation of the statute that the Commission already has rejected. Section 332(c)(7)(A) states, “Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.”<sup>23</sup> “Personal wireless service facilities” are defined as facilities for the provision of “commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services.”<sup>24</sup>

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<sup>22</sup> See, e.g., Comments of the Virginia Joint Commenters at 45-47; Comments of the City and County of San Francisco at 14-18; Comments of the City of San Antonio at 10.

<sup>23</sup> See 47 U.S.C. § 332(c)(7)(A).

<sup>24</sup> See *id.* § 332(c)(7)(C).



While the municipal commenters argue that this language serves as an absolute barrier to applying Section 253 to small cell networks,<sup>25</sup> this is a bridge too far.<sup>26</sup>

The municipal commenters make no attempt to reconcile the text of Section 332(c)(7)(A) with that of Section 253(a), which states that “[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of *any* entity to provide *any* interstate or intrastate telecommunications service.”<sup>27</sup> The municipal commenters’ interpretation would effectively rewrite Section 253(a) to replace “any entity” with “any entity that does not provide or facilitate the provision of personal wireless services.” This, of course, is not what Congress said in Section 253(a).<sup>28</sup> Rather, Congress drafted Section 253(a) to apply broadly to any telecommunications service, which the Act defines as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used*.”<sup>29</sup> As Crown Castle explained in its opening comments, the Commission has agreed that Section 253 applies to all facilities used to provide any telecommunications services, including wireless services.<sup>30</sup>

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<sup>25</sup> See, e.g., Comments of Smart Communities Siting Coalition at 52 (“What is clear is that where Section 332(c)(7) applies, Section 253 cannot.”).

<sup>26</sup> Even some municipal commenters recognize that courts have been unwilling to adopt their restrictive interpretation of the Communications Act. See Comments of the City and County of San Francisco at 15 (recognizing that while “a number of courts have been called on to decide whether section 253(a) can preempt a local ordinance that regulates use of the public right-of-way for wireless facilities, rather than seeking relief under 47 U.S.C. section 332(c)(7) . . . [t]hose courts have not squarely answered the question”).

<sup>27</sup> See *id.* § 253(a) (emphasis added).

<sup>28</sup> See *Franklin Nat’l Bank v. New York*, 347 U.S. 373, 378 (1954) (finding “no indication that Congress intended to make this phase of national banking subject to local restrictions, as it has done by express language in several other instances”); *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293, 302 (2003) (when Congress has intended to create exceptions to bankruptcy law requirements, “it has done so clearly and expressly”).

<sup>29</sup> 47 U.S.C. § 153 (emphasis added).

<sup>30</sup> See Crown Castle Comments at 25-26 (citing *Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7) to Ensure Timely Siting Review*, Declaratory Ruling, 24 FCC Rcd. 13994 ¶ 67 (2009); Remarks of FCC Commissioner Ajit Pai at the CTIA Wireless Foundation Smart Cities Expo, Washington, DC, 2016 WL 6538281, at \*1 (OHMSV Nov. 2, 2016) (observing that “Congress gave the Commission the express authority to preempt any state or local regulation that prohibits or has the effect of prohibiting the ability of any entity to provide wired or

Furthermore, any attempt to reconcile the application of Sections 253 and 332 must account for the specific nature of the services provided and the equipment used. Advanced fiber optic and small cell networks clearly fall within Section 253 in ways that other facilities may not. Crown Castle's small cell networks, for example, typically include a fiber optic backbone in the right-of-way, providing high capacity, high speed connectivity to the nodes that Crown Castle installs on existing poles or new ones that are typically no more than 30-40 feet in height.<sup>31</sup> These facilities provide a fundamentally different type of telecommunications service than some other wireless facilities, such as macro cells. The Virginia Joint Commenters reinforced this point, explaining that:

Wireline providers require access to public rights of way to deliver their services to customers, for the simple, practical reason that every potential customer of a traditional telephone company is located on property adjacent to or very close to the public rights-of-way. For a local government to exclude a traditional telephone company's facilities from the public rights-of-way would be an effective ban on the ability to provide service within that jurisdiction, so Congress decided they needed the protection of Section 253.<sup>32</sup>

The same rationale applies to small cell networks, which enable densification to provide high capacity services to users located in close proximity to the node. Just as with traditional wireline service, small cells must be deployed deep in the network, close to the customers, and rely on wired infrastructure to carry traffic to and from these small, localized wireless facilities. While there might be a reasonable basis to apply a different regulatory framework to 120 foot towers, the same cannot be said of fiber-based small cell networks like those that Crown Castle provides.

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wireless service.”); Public Notice at 2 (“Sections 253 and 332(c)(7) of the Communications Act and Section 6409(a) of the Spectrum Act are designed, among other purposes, to remove barriers to deployment of wireless network facilities by hastening the review and approval of signing applications by local land-use authorities.”)).

<sup>31</sup> See Ken Schmidt, *A Tale of Two Small Cell Proposals – Crown Castle v. Mobilitie*, <http://www.steelinthear.com/Blog/2016/04/tale-of-two-small-cell-proposals-crown-castle-vs-mobilitie.html> (Apr. 14, 2016).

<sup>32</sup> See Comments of the Virginia Joint Commenters at 46.

Access to the public rights-of-way on non-discriminatory terms, therefore, is critical to deliver the benefits of next generation networks, and Section 253 should apply to those efforts.

**B. Setting Reasonable Limits on Rates for Use of Public Rights-of-Way Does Not Constitute a Taking.**

Various municipal commenters incorrectly suggest that an attempt by the Commission to set reasonable limits for local rates for rights-of-way use would constitute a taking under the Fifth Amendment.<sup>33</sup> This allegation is meritless. First, municipalities lack a proprietary interest in the rights-of-way. Instead, the rights-of-way are public goods held in public trust. This simple reality fatally undercuts any takings claim—local governments are not being deprived of any “property” when the federal government limits their restrictions on rights-of-way use. Second, it is well established that FCC regulation of rates—even for use of privately owned property—does not constitute a regulatory taking. Finally, as several courts have recognized, given the de facto monopoly that municipalities have over rights-of-way in addition to their ability to influence use of even privately owned land, there is no such thing as a “fair market value” in this context, which makes alternative methods of calculating compensation not only reasonable, but absolutely necessary.

**1. Municipal Management of the Right-of-Way Does Not Amount to a Cognizable Property Interest.**

It is a prerequisite to any takings claim that the party asserting a taking must have a legally cognizable property interest.<sup>34</sup> A cognizable property interest is based on one’s

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<sup>33</sup> See Comments of the Joint Virginia Commenters at 49; Comments of the City of San Antonio at 27; Comments of the Smart Cities Coalition at 66; Comments of the Texas Municipal League at 21; Comments of the Virginia Department of Transportation at 13; Comments of the City and County of San Francisco at 24.

<sup>34</sup> See *Acceptance Ins. Companies, Inc. v. United States*, 583 F.3d 849, 854 (Fed. Cir. 2009).

ownership of property.<sup>35</sup> But here, the municipalities have no such interest because while municipalities manage the rights-of-way, they do not own them. The rights-of-way are public goods held in trust by municipalities.<sup>36</sup> Courts across the country have recognized that “the ownership interest municipalities hold in their streets is governmental, and not proprietary.”<sup>37</sup> As such, although a local government may regulate certain aspects of the rights-of-way and conduct limited proprietary activities there, it does not possess a property interest in that space.<sup>38</sup> True ownership lies with the public.

Congress recognized this distinction between ownership and management in Section 253(c), which “preserves the traditional authority of state and local governments to *manage* the public rights-of-way.”<sup>39</sup> However, to manage is not to own. Management of the rights-of-way includes the “vital tasks necessary to preserve the physical integrity of streets and highways, to control the orderly flow of vehicles and pedestrians, to manage gas, water, cable (both electric and cable television), and telephone facilities that crisscross the streets and public rights-of-way.”<sup>40</sup> If localities owned the rights-of-way, the Commission would not have specified these tasks: they would have been assumed.<sup>41</sup> By explicitly preserving these management rights,

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<sup>35</sup> See *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1215 (Fed. Cir. 2005) (“[A] claimant seeking compensation from the government for an alleged taking of private property must, at a minimum, assert that its property interest was actually taken by the government action”).

<sup>36</sup> Cf. *Liberty Cablevision Of Puerto Rico, Inc. v. Municipality Of Caguas*, 417 F.3d 216, 222 (1st Cir. 2005) (“Even when the fee of the streets is in the city, in trust for the public, it is a mistake to suppose that the city is constitutionally and necessarily entitled to compensation”).

<sup>37</sup> *Id.*

<sup>38</sup> See generally *Sprint Spectrum L.P. v. Mills*, 283 F.3d 404, 417-21 (2d Cir. 2002) (discussing distinction between proprietary and regulatory actions).

<sup>39</sup> *BellSouth Telecommunications, Inc. v. City of Mobile*, 171 F. Supp. 2d 1261, 1274 (S.D. Ala. 2001) (emphasis added).

<sup>40</sup> *TCI Cablevision of Oakland Cty., Inc.*, 12 FCC Rcd. 21396, ¶ 103 (1997).

<sup>41</sup> Cf. *Classic Tel., Inc.*, 11FCC Rcd. 13082 (1996) (Municipalities can only enact regulations that are “an exercise of public rights-of-way management authority or the imposition of compensation requirements for the use of such rights-of-way”).

Congress chose not to grant a proprietary exemption from the Communications Act, demonstrating that localities do not have a proprietary interest in the rights-of-way and cannot assert a takings claim.

**2. FCC Rate-Setting and Access Requirements Are Not a Regulatory Taking.**

Even if there were a municipal property interest, a takings claim would nonetheless fail on the merits. While the municipal commenters argue that FCC regulation of rates and access would effectuate a regulatory taking,<sup>42</sup> this is hardly the case. None of the proposed Commission actions would prevent municipalities from charging reasonable application fees to recover the costs to review and issue permits, reasonable fees for supervising the construction of facilities and ensuring their compliance, and reasonable management fees to cover the costs of monitoring the facilities and maintaining the rights-of-way. Municipalities, therefore, will still be justly compensated for providing access to their rights-of-way. The only things that would change are that localities would be unable to discriminate amongst services and their fees would be unable to exceed their reasonable costs.

There is ample precedent for FCC regulation of fees for accessing infrastructure—even outside the public rights-of-way. For example, the Commission already regulates the amount utilities can charge for pole attachments under the Pole Attachment Act, which requires “just and reasonable” rates.<sup>43</sup> The Supreme Court upheld the Commission’s regulations, holding that these rates “do[] not authorize a taking of property within the meaning of the Fifth Amendment.”<sup>44</sup> “It is of course settled beyond dispute that regulation of rates chargeable from the employment of

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<sup>42</sup> See, e.g., Comments of the Virginia Department of Transportation at 14; Comments of the Joint Virginia Commenters at 52.

<sup>43</sup> 47 U.S.C. § 224(b)(1).

<sup>44</sup> *F.C.C. v. Florida Power Corp.*, 480 U.S. 245, 254 (1987).

private property devoted to public uses is constitutionally permissible.”<sup>45</sup> The only limitation is that these rates cannot be “confiscatory.”<sup>46</sup> The Commission’s regulation of the maximum rate “provid[ed] for the recovery of fully allocated cost, including the actual cost of capital,” so it could not “seriously be argued” that these rates were confiscatory.<sup>47</sup>

That same reasoning applies here. Imposing a reasonable limitation on what a municipality can charge for accessing the rights-of-way is certainly less intrusive than regulating rates, and thus is clearly permissible. Local governments will still be able to collect fees from utilities seeking to use their rights-of-way. As proposed, the Commission would not be setting a standard rate, nor capping costs or imposing a formula for determining reasonable costs, but only limiting what a municipality can charge. Like with pole-attachment rates, these rates provide for the recovery of fully allocated costs. They are hardly confiscatory. The similarities between the proposed Commission action here and what the Commission already does – and the Supreme Court upheld – with pole attachments are unavoidable. The only significant difference between the two is that pole-attachment rates regulate compensation for *private* property,<sup>48</sup> whereas these rates would compensate for publicly-*managed* property. If Commission regulation of compensation rates for private property does not effectuate a taking, then ensuring that municipalities do not impose unreasonable charges for land held in public trust does not either.

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<sup>45</sup> *Id.* at 253.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 254.

<sup>48</sup> *Id.* at 253 (“It is of course settled beyond dispute that regulation of rates chargeable from the employment of *private* property devoted to public uses is constitutionally permissible”) (emphasis added).

3. **Attempts By Jurisdictions to Regulate Deployment On Public and Private Land Prevents the Determination of a Fair-Market Value For Accessing The Rights-Of-Way.**

Even the concept of “fair market value” for access to the public rights-of-way is a myth, given the vast control municipalities have over land use within their jurisdictions. While fair-market value is the typical measure of just compensation,<sup>49</sup> determining fair-market value requires a market, and no such market exists for rights-of-way.<sup>50</sup> Municipalities can use regulation to prevent infrastructure providers from building outside the rights-of-way, creating a monopoly. And even where local jurisdictions avoid such blatant manipulation, technological realities mean that providers may have little choice but to place their facilities in the public rights-of-way. To work as intended, small cells must be situated very close to the customer; a few feet can make a huge difference in coverage and effectiveness. This often dictates placement in the rights-of-way, close to the roads and sidewalks used by customers. Whether regulatory or technological, this de facto monopoly allows localities to charge excessive rates knowing that utilities cannot go elsewhere to install their facilities.

The Communications Act recognizes the lack of a market. Section 253(c)’s requirement for fair and reasonable compensation was designed “to prevent monopolistic pricing by towns,” recognizing that “without access to local government rights-of-way, provision of telecommunications service using land lines is generally infeasible, creating the danger that local governments will exact artificially high rates.”<sup>51</sup> In light of this fact, imposing limits on what a

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<sup>49</sup> See *United States v. Commodities Trading Corp.*, 339 U.S. 121, 123 (1950); *Alabama Power Co. v. F.C.C.*, 311 F.3d 1357, 1368 (11th Cir. 2002).

<sup>50</sup> See *Alabama Power Co. v. F.C.C.*, 311 F.3d 1357, 1368 (11th Cir. 2002) (“There is not an active, unregulated market for the use of elevated communications corridors”).

<sup>51</sup> *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 79 (2d Cir. 2002).

municipality can recover is consistent with the Communications Act's requirement and helps ensure accurate rates.

The impossibility of determining fair-market value for accessing the rights-of-way requires using a different form of just compensation.<sup>52</sup> Just compensation simply requires providing “the full and perfect equivalent in money of the property taken.”<sup>53</sup> Cost recovery is an adequate alternative, as it allows the municipality to recover its losses.<sup>54</sup> This is also the Court approved method for pole-attachment rates.<sup>55</sup> Those rates are an appropriate alternative to fair-market value because they require attachers to pay costs associated with using the poles and because those costs are the only loss suffered by pole owners.<sup>56</sup>

The same is true here. Under the interpretation of Section 253(c) advanced by the majority of telecommunications providers, municipalities would still receive just compensation. They will be able to recover all costs associated with permitting and managing the rights-of-way. Understanding that there are variances in costs, the Commission would allow municipalities to determine the amount they need to recover. Because this method of compensation allows a local jurisdiction to recover its losses from providing access to its rights of way, it satisfies the Constitution's just compensation requirement.

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<sup>52</sup> *United States v. 50 Acres of Land*, 469 U.S. 24, 29 (1984) (“Deviation from [the fair-market value] measure of just compensation has been required only when market value has been too difficult to find, or when its application would result in manifest injustice to owner or public”).

<sup>53</sup> *United States v. Miller*, 317 U.S. 369, 373 (1943).

<sup>54</sup> *Cf. Brown v. Legal Found. of Washington*, 538 U.S. 216, 235 376 (2003) (“Just compensation required by the Fifth Amendment is measured by the property owner's loss”).

<sup>55</sup> *See Florida Power*, 480 U.S. at 253-54.

<sup>56</sup> *See Alabama Power*, 311 F.3d at 1369 (“So long as the marginal cost of the attachment is paid, the power company incurs no lost opportunity or any other burden”).



**C. State Legislation and Model Ordinances Are Not a Substitute for FCC Action to Expedite Deployment of Small Cell Facilities.**

Several commenters have suggested that the proposal or adoption of state legislation and/or model municipal ordinances governing small cell network deployment obviate the need for FCC action.<sup>57</sup> These commenters are mistaken. Crown Castle is pleased that some states and municipalities have recognized the importance of encouraging development of next generation wireless networks, and the company has worked collaboratively in the drafting of many codes and ordinances across the country. The company stands ready to continue this process with jurisdictions that are willing to adopt reasonable, good faith measures to permit carriers to access the rights-of-way.

However, these state and local efforts are not a substitute for the adoption of uniform standards. As the record clearly demonstrates, providers of telecommunications services *universally* perceive significant issues with broadband deployment, despite some successes in individual jurisdictions.

There are at least two problems with relying on a state-by-state or locality-by-locality model for reform. First, those states and localities that have adopted legislation or model ordinances remain a small minority of those jurisdictions that would benefit from small cell networks. In Crown Castle's experience, it is far more likely for a jurisdiction to have imposed a moratorium on approval of small cell applications than to have adopted legislation or a model ordinance specifically governing small cell applications. Even where municipalities work in good faith to try and develop standards, these processes can take many months—and often years.

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<sup>57</sup> See, e.g., Comments of Virginia Joint Commenters at 29-30; Comments of Georgia Municipal Association, Inc. at 1-2; Joint Comments of League of Arizona Cities and Towns, *et al.* at 31; Comments of Smart Communities Siting Coalition at 48-49.

Second, a state-by-state approach does not address the problem that comes with having to devote resources to navigate piecemeal rules and regulations governing small cell deployment. Unfortunately, not all legislation or local regulations are created equal, and in Crown Castle's experience, many efforts actually create more barriers than they resolve. Most municipal ordinances developed for small cell include discretionary zoning (or the equivalent), which is highly subjective and rarely provides a clear path to permit small cell networks. In other instances, legislation includes outright bans on deployment of small cells in specific parts of a jurisdiction.<sup>58</sup>

The FCC action contemplated in the Public Notice and Crown Castle's comments will complement, not replace, state and local actions. By establishing a minimum standard for broadband deployment, the Commission will advance the federal interest in a national telecommunications policy. This would neither prejudge the activities of the Broadband Deployment Advisory Committee, which is charged with "drafting for the Commission's consideration a model code covering local franchising, zoning, permitting, and rights-of-way regulations," or the role of states and localities. The FCC can and should balance the federal interest in promoting the development of advanced broadband networks with the state and local interests in public safety, and we believe the proposed actions strike the proper balance.

## **V. Conclusion**

Crown Castle appreciates this opportunity to submit its views on steps the Commission can take to ensure that all Americans receive the benefits of next generation wireless networks. For the reasons stated above and in its initial comments, Crown Castle encourages the

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<sup>58</sup> For instance, the Wisconsin legislature is currently considering legislation that would allow municipalities to prohibit the deployment in (and, in some instances, within 750 feet from) certain residential zoning districts. *See* A.B. 130, 2017 Leg. (Wis. 2017).

Commission to act swiftly to develop a consistent regulatory framework for the deployment of small cell facilities nationwide.

Respectfully submitted,

CROWN CASTLE  
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